United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
JOSEPH C. SMITH

76-7158

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE EASTERN MARINE & FIRE INSURANCE CO.,
Plaintiff-Appellant,

—against—

S.S. COLUMBIA, her engines, boilers, etc., ORIENTAL EXPORTERS, INC., and OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Defendants-Appellees,

—against—

OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Third-Party Plaintiff-Appellee,

—against—

JOHN PEMBERTON MOSSE, an Underwriter at Lloyd's and INDEMNITY MARINE ASSURANCE CO., LTD.,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendants-Appellees and Third-Party Plaintiff-Appellee
25 Broadway
New York, New York 10004
422-7585

JOSEPH C. SMITH,
Of Counsel.

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Statement

The appellants' Statement of the Issues is an effort to persuade this Court to review in minute detail all of the evidentiary facts considered by the District Court in arriving at its ultimate finding that the owner had carried its burden of proof that it exercised due diligence to make the S.S. COLUMBIA seaworthy under the Carriage of Goods by Sea Act.

Four fact witnesses, the vessel's master, chief engineer and the two independent marine surveyors who supervised the repairs of the vessel at the two drydocking periods immediately preceding the casualty, for which the general average was declared, testified at the trial. The deposition testimony of the Coast Guard officer Captain Heath, who attended the last drydocking before the casualty, and all of the American Bureau of Shipping records, underwriters' surveys and repair bills for the two drydockings were in evidence.

ARGUMENT

POINT I

There is no dispute that a shipowner is not relieved of his duty to exercise due diligence by retaining the services of independent marine surveyors.

Appellants' argue that "due diligence was not exercised merely by shipowner's retaining the services of independent marine surveyors" and that the Court held as a matter of law, that the owner had exercised due diligence by appointing a surveyor to superintend vessel repairs and having the latter be satisfied as to the adequacy and propriety of repairs. The District Court made no such conclusion. The thrust of the Court's findings was that it believed the testimony of the fact witnesses and that if there were some defect, it could not be discovered by the experienced and well-qualified surveyors who attended the vessel. The appellee has never contended that it was relieved of its responsibility by appointing a competent independent marine surveyor. There is no dispute that the duty to exercise due diligence is nondelegable.

It is obvious from the District Court's opinion that it examined the testimony of the fact witnesses and the corroborating documentation, which revealed not the slightest notion that the repairs and maintenance in the 1964 and 1965 drydockings were anything but to the best shipyard standards. Appellee proved by a preponderance of the evidence that those acting for it performed their responsibilities in accordance with the high standards expected of a competent marine surveyor.

The Court did determine for itself, after listening to the extensive testimony in the courtroom, that the work which appellants criticized in the abstract was done properly.

Although the ABS Classification Certificates and Coast Guard Certificate of Inspection do not have the weight given the fact witnesses who testified in Court, these inspections and records made from the inspections are additional proof upon which the Court can rely in arriving at its ultimate findings. The Court scrutinized all of the evidence and it cannot be said that because the Court did not set forth each piece of evidence upon which it relied, that it did not determine for itself that the repairs were adequate and proper (B. 9*) or that it "relied upon the opinions of the surveyors and inspectors in lieu of making its findings as to the propriety and adequacy of the 1965 repairs to the rudder". (B. 13)

POINT II

The District Court's findings of fact fully support its conclusion that the shipowner met its burden and proved that it exercised due diligence.

Appellants' recitation of the facts omits essential facts found by the District Court upon which it based its conclusion that COLUMBIA's owner exercised due diligence as required by the Carriage of Goods by Sea Act, 46 U.S.C. 1303(1), 1304(1) and ignores the overwhelming evidence in the form of contemporaneous records made before the casualty and the testimony given at trial by the two well qualified independent marine surveyors who supervised the repairs and maintenance at the two drydocking periods

* Refers to Appellants' Brief.

prior to the casualty and COLUMBIA's master and chief engineer who inspected the vessel before it loaded her cargo at Safi, Morocco.

The appeal is made solely on the erroneous premise that a "brass split pin [cotter pin] was not reinstalled in the COLUMBIA's lower pintle upon completion of rudder repairs made at Jacksonville in 1965." (B. 5). There is simply no evidence that such a split pin was ever in the COLUMBIA, was required to be there or that she would have been unseaworthy without it. Appellants' witness, Mr. Ganly, when asked about the use of a split pin as a locking device testified:

> "Q. Is that the only one that's used in the shipping business? A. No, it is not.
>
> Q. How many different types are there? A. That I couldn't say. It depends on a man's imagination. It can be done a number of ways." (A. 231*).

In an attempt to show that the horseshoe keeper locking device installed on the rudder pintles and nuts at Jacksonville, Florida in March, 1965 was negligently done, Ganly, interpreted plaintiffs' Exhibit 12 as being improper (A. 213-4). No such conclusion can be drawn from that exhibit or from Mr. Berke's testimony on cross-examination by plaintiffs' counsel. (A. 139-140).

The trial judge had an opportunity to hear and observe all of the witnesses except U.S. Coast Guard Captain Heath, who also attended the last drydocking before the casualty. The trial judge rejected appellants' theory of the cause of the casualty as speculated by Ganly, who admittedly had

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* Refers to Joint Appendix.

little practical experience in supervising or making rudder repairs (A. 230). His "uncontradicted expert testimony" (B. 7) established nothing that impressed the District Court and it accepted the testimony and evidence in appellees' behalf that the repairs were properly made and found that appellees had carried their burden of proof that they exercised due diligence to make COLUMBIA seaworthy.

Appellants concede:

> "Of course, the mere fact that the District Court relied upon the opinions of the surveyors and inspectors • • • of the S.S. COLUMBIA would not constitute grounds for reversal in the absence of substantial evidence that the repairs were, in fact, inadequate and improper." (B. 13-4).

There was no substantial evidence that the repairs were inadequate or improper.

In *The Floridian* (2 Cir., 1936), 83 F. 2d 949, this Court said:

> "From the mere breakage there is no evidence indicating negligence of the appellant to deprive it of the exceptions of the bills of lading. If competent men considered the vessel seaworthy, after an inspection, with full knowledge of repairs made, it indicated that due diligence had been used in preparation for the expectable tests and strains of her voyage, and the vessel owner was justified in believing her fit for the voyage. Any damages to the vessel later must be regarded, particularly in heavy seas, as resulting without fault on the part of the owner." (p. 951)

The District Court did not misconstrue or misapply the law as suggested by appellants (B. 14, Point II). It is clearly stated in the Opinion and Order that the "burden falls thus on the owner, here the defendant, to prove its 'due diligence'. I find that it has met that burden" (A. 10a).

Plainly, the Court recognized the burden the appellees were called upon to bear and carefully scrutinized the testimony of the appellees' witnesses at trial on the issue of due diligence and accepted that testimony as to credibility and found that they successfully carried their burden. The Court aptly states, capsulizing its finding on this point, "What more could be done?"

POINT III

There is no evidence that the repairs were either inadequate or improper.

Appellants' argument that Mr. Ganly's concatenation of the events that preceded the loss of the rudder was rejected by the District Court and with good reason. His testimony was obviously less persuasive than that of appellees' independent expert Mr. Salzarulo (A. 146-161). Mechanical devices fail for many reasons other than inadequate or improper repairs. The District Court considered that question and rejected the suggestion that the "rudder and the other metal parts be x-rayed to determine possible metal fatigue". (A. 11a).

In all of the cases that have been cited by appellants in its brief with respect to due diligence, the vessel owner was shown to have failed to do something he should have done in his exercise of due diligence. The only thing that the

appellants were able to show at the trial was that a different type of locking device could have been used on the rudder pintles. The more persuasive evidence given by appellees' witnesses was that the device used on the COLUMBIA was the method preferred by experienced marine surveyors.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Defendants-Appellees and Third-Party Plaintiff-Appellee.

Dated: New York, New York
June 18, 1976

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